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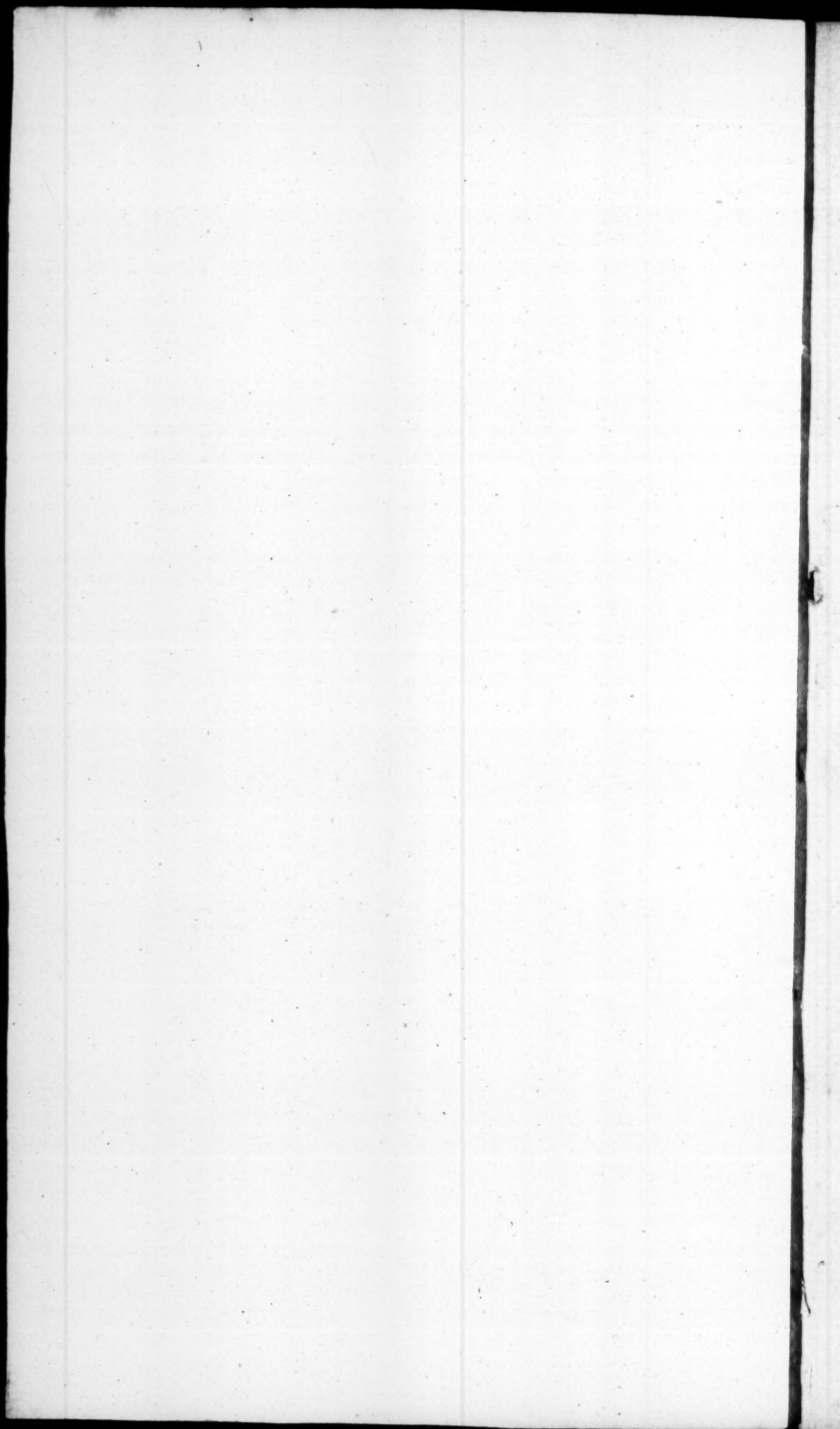
RIGHTS AND DUTY

OF

JURIES,

IN

TRIALS FOR LIBELS.



AN
ENQUIRY
INTO THE
EXTENT
OF THE
POWER OF JURIES, &c.

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AN 29
ENQUIRY
INTO THE C#
EXTENT
OF THE
POWER OF JURIES,

ON
TRIALS OF INDICTMENTS OR INFORMATIONS,
FOR PUBLISHING
SEDITIONOUS, OR OTHER CRIMINAL
WRITINGS, OR LIBELS,

EXTRACTED FROM
A MISCELLANEOUS COLLECTION OF PAPERS
THAT WERE PUBLISHED IN 1776,

INTITULED,
ADDITIONAL PAPERS CONCERNING THE
PROVINCE OF QUEBEC.

by Francis Maseres.

D U B L I N:

FOR MESSRS. E. LYNCH, P. BYRNE, W. JONES, W. M'KENZIE,
R. M'ALLISTER, AND H. WATTS.

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E N Q U I R Y, &c.

AS I highly esteem and reverence the Trial by Jury, which forms one of the most distinguishing bulwarks of the civil liberty which Englishmen enjoy, I am always anxious to see Jurymen exert their power with such discretion and moderation, as to give their fellow-subjects continually fresh cause to rejoice at their being invested with it. And, with this view, I always wish them to avoid two mistakes into which they are sometimes apt to fall. The one is, the giving the plaintiff, in an action of trespass, a

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greater sum of money, by way of compensation for the injury he has sustained, than is, in their opinion, sufficient for that purpose; which they are sometimes inclined to do through a laudable spirit of indignation against the practice of such oppression as is the subject of the complaint before them, and with a design to deter other persons from being guilty of the like. But this is departing from the business that is referred to their decision, and taking upon them to be criminal judges, that inflict punishment by way of terror and example, instead of *assessors*, or *appraiators*, of the magnitude of the particular injury that is the subject of the action which they are called upon to try. Every instance of an irregularity of this kind in the exercise of their authority, I am fully persuaded, lessens the respect and confidence which the public entertains for their decisions, and thereby tends, in some degree, to undermine and weaken their authority. The other manner of deviating from the line of their duty (of which, however, I believe, there are very few instances) is an obstinate resolution to determine a matter of law, that happens to be involved in the issue, or question, referred

referred to their decision, in a manner contrary to the direction of the judge who tries the cause. This, I confess, they have a legal right to do, because the whole matter contained in the issue joined between the parties, whether it be fact or law, is brought before them and referred to their decision. But, surely, common sense must teach us, that, if they mean to do justice between the parties, they ought, with respect to such points (in which they must know themselves to be unskilled), to be guided by the opinion of the judge; or, if they think that may be partial or insufficient, to find a special verdict, to the end that the law may be rightly determined, upon full argument by the judges of the court in which the action was brought.

There is, however, one subject upon which, I imagine, all lovers of public liberty would be inclined to think, that juries ought to have the whole power of determining the matter in contest. The subject, I mean, is the Doctrine of seditious libels, and the criminal prosecutions carried on against the writers and publishers of them. These prosecutions

tions are attended with so much danger to that most valuable privilege of English subjects, the *Liberty of the Press*, or the right of animadverting freely and publicly (but with a strict adherence to truth) on the pernicious tendency of public measures, that one would wish them to be intirely under the controul of *the people themselves*, so as never to be carried on with success but when *the people themselves* are satisfied of the falsehood and mischievous tendency, or, at least, of the mischievous tendency of the writings which are the occasion of them. And for this purpose it would be necessary, that the whole determinations of these prosecutions should be vested in the juries, who are a part of the people, and may be supposed to entertain the same sentiments with them. For, if the event of these prosecutions was to depend upon the inclinations of the judges, there would be reason to apprehend, that they would meet with success much oftener than would be consistent with that spirit of free enquiry and examination of the measures of government, which is necessary to the correction of the abuses of power, and the preservation of public liberty. Those magistrates must naturally be supposed

be, in some degree, partial to government in cases of this kind, even from respectable motives. Their friendship and their gratitude would often contribute to make them so;—not to mention their self-interest and ambition, which would lead them to hope for future favours from the crown. For, who would be the object of the censures contained in the writings under prosecution? Probably the king's ministers of state, by whose favour and patronage they, perhaps, would have obtained their offices of judges, and might hope to gain still higher honours for themselves, or preferments for their families. In these cases, therefore, a jury of men of ordinary rank, as, for example, of substantial house-keepers in the city of London, would be much less likely to interpret the intentions of the writers and publishers of such writings in a severe manner, and to consider the tendency of them as of dangerous consequence to the public, than a bench of judges would be: and yet, they would be sufficiently interested in the preservation of the public peace (upon which the continuance of their own liberty, trade, and property, would depend) to be free from any undue bias of avour towards those

those persons, if the writings, they had published, had a real and manifest tendency to disturb it : and therefore, upon the whole, they would be a safer and more impartial tribunal for the determination of these matters than the judges. It is reasonable, therefore, that all lovers of public liberty should wish, that the whole power of determining the merits of prosecutions upon these subjects should be vested in the juries. But, in order to its being so, it is by no means necessary, in my apprehension, to depart in any degree from the rules above mentioned, concerning the distinct provinces of judges and juries in the decision of law suits, and the moral obligation, under which jurymen have been supposed to lie, to keep strictly within the bounds of their own province, without ever presuming to determine any matters of law. All these rules may, as I conceive, be most inviolably adhered to, and yet juries will remain in possession of the whole of this important power of deciding all the matters in contest upon prosecutions for seditious libels. For in these prosecutions all the matters in contest between the crown and the defendant upon an issue of *Not guilty* are mere
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matters of fact, without any the least mixture of matters of law. This I shall now endeavour to prove, by considering the several allegations which go to the composition of a criminal charge for writing a seditious libel.

An indictment, or information against a man for writing a seditious libel, consists of the four following allegations, and of nothing more; to wit, first, That the defendant wrote the paper in question, which is always set forth. word for word, in the indictment or information; secondly, That he published it; thirdly, That he published it with a bad intent; and fourthly, That the paper has a tendency to disturb the public peace. I speak of an indictment or information in which the seditious paper is not charged to be false, but only scandalous and malicious, and tending to cause a breach of the peace. For, if the charge of falsehood is inserted in the information, that must be reckoned as a fifth allegation contained in it. This was formerly thought a necessary part of a charge for publishing a seditious libel, but was omitted (for the first time, as I have heard) in the information

formation brought by Sir Fletcher Norton in 1764, against Mr. Wilkes, for publishing the 45th number of the paper called the North Briton, and has been omitted in most of the informations that have been brought for such publications since that time. The reason for omitting it was, to avoid the altercation which it used constantly to occasion at the bar upon the trial of these informations, and the plausible, if not just, pretence it afforded to the defendant's counsel to insist, that the charges contained in them were not proved. For, though this charge of falsehood used to be inserted in the informations, no attempts were ever made to support it by proof, and the judges who tried these informations, would neither require the counsel for the crown to prove that the writings in question were false, nor even permit the counsel for the defendants to bring proof that they were true; so that every information that was brought for a seditious libel, was defectively proved in this article of the falsehood of it. Yet the juries used often to find verdicts for the crown against the defendants, notwithstanding this defect in the proof of the charges brought against them; and the court of King's-bench used, in consequence
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of these verdicts, to pass judgments, and inflict punishments upon them. This, however, was sometimes complained of as an irregular way of proceeding, that was not consistent with the rules of law observed in other cases, and more especially in criminal proceedings, in which, in all other instances, the greatest strictness is required. And it was often made use of at the trial, by the defendant's counsel as an argument to the jury, to persuade them not to find the defendant guilty, since the counsel for the crown had not made good the whole of the charge against him, but had failed with respect to so material an article as the falsehood of the paper complained of. "For," said they, "if the law be really so severe as to consider the publication of a truth as a public crime, and deserving of public punishment, it must at least be allowed, that it is a less crime than the publication of the same things would be if they were false; and therefore, the defendant, who is only proved to have published the writings in question without any proof that they are false, ought not to be considered in the same light, and made liable to be punished in the same manner, as if it had been proved that the said writings were false,

as he will be, if the jury should find him guilty upon this information." This argument (which I take to be unanswerable) was frequently made use of by the counsel for the defendants upon the trial of these informations, while the charge of the falsehood of the libel or writing complained of used to be inserted in them: and it probably might sometimes prevail with the juries (notwithstanding the directions of the judges to the contrary), to find the defendants not guilty. Sir Fletcher Norton, therefore, seeing that the insertion of this charge of falsehood in these informations tended only to hamper the proceedings of the officers of the crown against the publishers of seditious libels, resolved to leave it out for the future in all the informations of that kind of which he was to have the management; in doing which he thought himself sufficiently warranted by the preceding declarations of the judges on various occasions, that this charge of falsehood was *an immaterial* part of every information for a seditious libel, which the prosecutor was not bound to prove, nor the defendant permitted to disprove. And it is said, that Sir Fletcher's successors in office have followed his example. And thus, ever since that prosecution of Mr.

Wilkes for the publication of the famous number 45 of the North Briton, those informations have been drawn up without alledging that the writings complained of in them were false; and the prosecutions of these offences have gone on, in this respect, more smoothly than before, being rid of all the difficulties, which the insertion of that charge of falsehood used to give rise to.

I say then, that in an information for writing and publishing a seditious libel, which is not charged to be false as well as malicious and scandalous, there are only the four allegations before mentioned, to wit, first, that the defendant wrote it; 2dly, that he published it; 3dly, that he had a bad intention in publishing it; and 4thly, that the paper has a mischievous tendency, or a tendency to produce certain bad effects that are described in the information, such as alienating the affections of his Majesty's subjects from his Majesty's person and government, or raising jealousies in their minds against the parliament or the courts of justice, and the like. Now these allegations, I conceive, to be all matters of fact. The two first of them, to

wit, the having writ the paper, and the having published it, are universally allowed to be so: but the two latter, to wit, the intention of the publisher, and the tendency of the paper to produce the mischievous effects described in the information, have been sometimes declared by the judges to the matters of law, or as they have expressed it) inferences of law drawn from the fact of publication, and fit only to be considered and determined by the judges, without the interference of the juries. But this seems to be a modern doctrine of the judges, that has been adopted by them only since the time when Lord Raymond was chief justice of the king's bench. For, before that time, we find many judges (and those too, some of them men of character for abilities and learning in the law, and others of them great friends to the royal prerogative, and to a rigorous method of government) who were of opinion, that both the intention of the writer or publisher of the paper, and the tendency of the paper to produce certain ill effects, were proper objects of the jury's consideration. And this opinion, I conceive, to be agreeable to the truth, for the following reasons.

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In making this enquiry into the true distinction between matters of law and matters of fact, in the law-sense of those words, that is, between matters which are fit only for the consideration of the judges, and matters which are fit objects of the consideration and determination of a jury, I think, we may assume it as an *axiom*, or fundamental maxim, which every body must allow the truth of, that *every thing that can be proved by the testimony of witnesses, is a fit object of the jury's consideration*. For of this sort of evidence, this *external* evidence, they are universally allowed to be the proper judges : and the oath they take, when they are impanelled, “ to try the issue joined between the parties and a true verdict give *according to the evidence*,” plainly makes them so; and indeed, it gives them a power of judging and determining according to *other evidence*, besides the testimony of witnesses, when such other evidence is produced before them. But it is sufficient for the present purpose, that they should be allowed to be true and proper judges of all that external evidence that consists in the testimony of witnesses. We must, therefore, enquire, whether or no the intention of a man in publishing a writing, and
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the tendency of the writing to produce a particular ill effect, are matters which are capable of being proved, or disproved, by the testimony of witnesses. Now it appears to me, that they most manifestly are capable of being so proved, or disproved. For, first, as to the intention. Who can doubt but that proof may be given by witnesses, that the paper was published with an innocent, or even a good intent, or, in some cases, with an absence of the bad intent alleged in the information, and without which there can be no guilt in the publisher? This may be easily illustrated by the following examples, It is allowed upon these prosecutions, that the delivery of a single paper from one person to another (whether the paper be in print or manuscript), is an act of publication. Suppose, therefore, that it could be proved, that the defendant, who was prosecuted for publishing a seditious paper, and who had been already proved to have delivered it to another person, that is, to have published it, was an illeterate man, who could neither write nor read, and that he knew nothing of its contents, and that he was a servant to a printer or bookseller (as for instance, their porter), and had delivered the paper,

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by his master's order, amongst the papers, or parcels of goods. Certainly this proof would be material to the question, whether the defendant was guilty or not of the crime imputed to him by the information, and would be sufficient to shew, that he had not that ill intention in publishing the paper, which was necessary to make him guilty of that crime, and consequently would be a ground for his acquittal. And, as this proof would be extraneous to the paper itself, and could only be given by witnesses, it could be given only to the jury, who are confessedly the judges of all the evidence that is delivered by witnesses in every cause. If therefore, the information were brought against such servant or porter, he ought evidently be acquitted by the jury on account of this absence of the criminal intention imputed to him in the information. If, indeed, the information was brought against the bookseller himself, instead of his porter, and the same proof was to be produced against him, as has been just now supposed to have been brought against his porter, to wit, that he had delivered the paper to another person with his own hand, but that (though he was skilled in reading and writing) he had not read it, and
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did not know its contents at the time he delivered it, this, perhaps, might not be deemed sufficient to excuse him from the charge of publishing it with a criminal intention, because it was his duty, as a master bookseller, to attend to the nature of the things he published, and examine them, or cause them to be examined by other proper persons, before he ventured to make them public. I say, it is possible that he might, in such a case, be held guilty of the criminal intention imputed to him in the information; though I must confess, I do not think it quite clear that he ought to be so. And even if, upon an information against a bookseller for publishing a seditious libel, it should be proved, that the servant, or shopman, of such bookseller, had delivered a seditious paper to a purchaser, by virtue of his master's general directions to him to attend in the shop, and sell books to his customers, such a delivery by the servant might, perhaps (though I am not without some doubts about it), be held good presumptive evidence of an intention in the master to publish it, although it should be proved that the master himself knew nothing of the contents of it; because it might be said in this case,

case, as well as in the former, that the master had been guilty of a criminal negligence, in not previously examining it, or causing it to be examined, before he ventured to make it public. But if, in this last instance of the delivery of the paper by the servant of the bookseller, it should be proved, not only that the master knew nothing of its contents at the time of its delivery or publication, but that, at that time, and for a week before the said delivery of it, or even before it had been received into his shop, or ordered to be sent to it, he had been sick in bed, and delirious, and that the whole business of his shop had been conducted by his foreman, he must, I presume, in consequence of such evidence, be esteemed free from the intention of publishing it imputed to him in the information, notwithstanding it had been published in consequence of his general directions to his servant to sell books to his customers; because he would, in such a case, have been incapable, at the time of the publication of such paper, of superintending the business of his shop, and examining the books that were brought into it, and consequently would not have been guilty of the criminal negligence

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above mentioned : and therefore, in such a case, he must, I presume, be acquitted. Now, in all these cases, the proofs here mentioned (which relate to the intention of the defendant in publishing the paper in question) could be given only by witnesses, and consequently could be given only before a jury ; and therefore, the intention of the defendant in publishing the paper is a proper object for the jury's consideration.

Many more instances might be brought to shew, that the intention of a man in writing, or publishing a paper (or indeed in doing any other act, of which a moral agent is capable), may be proved, or disproved, by the testimony of witnesses, and consequently is a fit subject for the consideration of a jury. And in most cases it can be proved no other way. Witnesses may prove, that the writer of a libel confessed to them, or declared to them with triumph, that he wrote the paper in question on purpose to raise such or such a disturbance, to cause a mutiny in the army or the fleet, or a resistance to a new tax, or to some other act of government. Or they may prove, that certain praises given to particular

ticular persons in the libel, are meant ironically, and contain the severest censures;—that they heard the writer confess he meant them so, and declare that he hoped that the world would understand them so;—that they know that the persons spoken of in the paper, are not usually commended for the virtues therein ascribed to them, but are reproached by their enemies for the want of them, and consequently, that the passage is to be understood ironically. Such evidence would be highly proper and useful towards ascertaining the criminal intention of the writer of the paper in question; and without some such evidence, it will often be impossible for either the judge or jury rightly to understand the meaning and drift of the paper, or the intention of the writer in publishing it. Now, such kind of evidence, as it can be given only by witnesses, can be given only before a jury; and therefore, the jury must have a right to determine, how far it tends to prove or disprove the point to which it relates, to wit, the criminal intention of the publisher of the paper. This seems to me to be so plain, that I am somewhat afraid my readers will blame me for dwelling so long upon the

proof of it, and be apt to say in the words of Cicero, concerning a man who should take great pains to prove that Alexander alone, without the assistance of his soldiers, could not have won the battle of Arbela, *uteris in re non dubiâ argumentis non necessariis*. And indeed I should not have thought it needed any proof, if I had not seen it denied by persons of great authority, who have asserted, that the criminal intention of the publisher of a libel is not a matter of fact, or matter fit for the consideration of a jury, but merely a matter of law, or an inference of law from the naked fact of publication, which the judges only ought to make. Yet these very persons of authority acknowledge, that the right of determining what the writer of the libel meant by the blanks and initial letters, and the feigned names that are often to be found in seditious libels, belongs to the jury only; which is not very consistent with the said assertion, since these are a part of the writers intention, which those persons contend to be a mere inference of law. I hope, therefore, upon the whole, that the reader who dares to make use of his own judgment, and is not disposed *jurare in verba magistri*,
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will be fully convinced that the intention of a man, in publishing a seditious paper, is a matter of fact, in the law-sense of the word, that is, an object of the evidence of witnesses, and of the consideration and determination of a jury, as well as the very act of publication itself.

It remains that we examine the fourth and last allegation that is contained in one of these informations, to wit, the tendency of the paper complained of to disturb the public peace, or produce the other ill effects that are set forth in the information. Now this point, I confess, is of a more subtle nature than either of the former three, and may be more easily represented as a mere point of law, or inference of law (as it is called) to be collected from the perusal of the paper itself. And yet, I think, upon a close examination, it will appear to be a matter of fact, or a proper subject for the consideration of a jury, as well as the three former points.

In order to discover whether or no the tendency of a particular paper is a matter of fact, or a fit object of the consideration of a jury, we

we must enquire whether or no it can be proved or disproved by the testimony of witnesses. For, if it can, it is a matter of fact, and the jury have a right to consider and determine it. Now it is certain, that this tendency can in most, if not in all cases, be either proved or disproved by witnesses; though it may also, in some cases, be collected from the mere perusal of the paper. If the paper contains blanks and initial letters (as most of these papers do), then it is most evident that, till the meaning of those blanks is ascertained, the tendency of the paper cannot be known; and the right of ascertaining the meaning of these blanks is confessed on all hands to belong to the jury. Therefore, in these cases, the right of determining the tendency of the paper must belong to the jury. And, if the paper contains no blanks, but is full of allusions to persons of great rank and power described under feigned names by circumstances that are peculiar to them, it is necessary to have witnesses to prove that those circumstances relate to the said persons, and consequently that they are the persons meant to be pointed out to the scorn and indignation of the public by the writer of the paper. Or in such a case, the
witnesses

witnesses may testify that they heard the defendant, the writer of the paper, himself, say, that he meant the said persons by the said description, and that he hoped the public would not fail to understand him. Or they may testify that they have often heard him utter the same invectives against those persons as are contained in the paper in question, though without confessing that he meant to describe those persons in the said paper, or even that he was the writer of it. All these various kinds of evidence would be admissible, in such a case, to prove, that the allusions in question did relate to the said persons of rank and power; without which relation, the said paper would be quite innocent and inoffensive, and have no tendency to disturb the public peace. This tendency, therefore, of the paper complained of to disturb the public peace, or produce the other bad effects set forth in the information, is in all these cases a thing capable of being proved by witnesses, and which, indeed, can be proved no other way, and consequently is a fit object of the consideration of a jury, or, in the law-sense of the words, a matter of fact. And even, if we suppose the paper in question to contain

contain neither blanks, nor initial letters, nor allusions to particular persons under feigned names, nor any other sort of disguise whatsoever (which seldom happens), but to name all the persons it means to speak of by their known names and offices, yet even in this case it is certain, that witnesses may be admitted to prove or disprove the tendency of the paper, that is, to confirm, or to controul and refute, that internal evidence of its tendency, which, I acknowledge, will in some degree result from the bare perusal of it. For witnesses may be brought to prove, that it has actually occasioned that disturbance which it seemed to be intended to create, as, for instance, that it has excited a spirit of dissatisfaction in the fleet or the army, or against the administration of justice by the king's courts, or the like. Such evidence of the paper's having produced such ill effects would be the strongest evidence possible of its *tendency* to produce them. And, on the other hand, if a paper was writ that contained a real panegyric upon a great man, couched under the form of a severe invective, ascribing to him those vices from which he was known to be peculiarly exempt, and denying

denying him those virtues in which he was known most to excel (as, for example, calling the great Duke of Marlborough an ill-bred, passionate, tyrannical man, that was utterly ignorant of the art of war, and quite given up to drunkenness, when he was known to be the calmest-tempered, mildest, best-bred gentleman of his age, of great skill in the art of war, and very temperate), and an information should be brought against the writer of it, for writing and publishing a seditious libel, it would in such a case be lawful for the defendant to call witnesses to prove, that the great man spoken of in the paper was so eminently free from the vices imputed to him in it, that it could only be understood, by all persons who had any knowledge of his character, as a panegyric on him, conveyed under the form of an invective, and that it had been generally so understood by all the world, and consequently could have no tendency to excite those disturbances which a belief of his having those vices would probably occasion. And if the jury believed these witnesses, and consequently were of opinion, that the paper had not the pernicious tendency ascribed to it in the information (and which from the

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mere perusal of it, with a knowledge of the character of the person spoken of in it, one would be apt to think belonged to it), it would be their duty to find the defendant Not guilty. In the next place, I will suppose the opposite case to the former, to wit, that of a severe invective against a great man, conveyed under the form of a panegyric, commending him for virtues which he was generally thought to want, without any blanks, initial letters, or feigned names. In such a case, it would be lawful for the prosecutor to produce witnesses to prove, that the writer of the paper was a bitter enemy of the great man thus ironically commended in it;—that they had often heard him express a very bad opinion of him, and deny him the virtues ascribed to him in the paper, and ascribe to him the opposite vices;—that they themselves therefore understood the paper to be meant ironically, and that they had met with several other persons, who had all understood it in the same manner;—that not only the writer, and the other enemies of the great man, but even most of his friends were of opinion, that he was not entitled to the praises bestowed on him in the paper, and that they, therefore, on that account (as well as on account of the known

known enmity of the writer against the great man), believed those praises to be meant ironically, and intended to bring him into public odium and contempt;—and that they actually had produced that effect, and raised a great disgust against him in the persons who were most connected with him, and whose cheerful obedience, assistance and concurrence, were most necessary to his discharging the duties of his great office with success and advantage to the public. If these things were made out to the satisfaction of the jury, it would be their duty to find the writer of the paper guilty of publishing a seditious libel, notwithstanding the apparent inoffensiveness of the paper, or its want of tendency to produce any ill effect, so far as its tendency could be collected from the mere perusal of it: so that in this, as well as in all the former instances, the tendency of the paper would be ascertained by the testimony of witnesses, and would consequently be the object of the consideration and determination of the jury. We may therefore, I think, safely conclude, that this fourth and last allegation, contained in an information against a man for writing and publishing a seditious paper or libel, to wit, its

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tendency to disturb the public peace, or to produce the other bad effects set forth in the information, is a proper object of the consideration and determination of a jury, or, in the law-sense of the phrase, a matter of fact, as well as the three former allegations, of the writing the paper, the publishing it, and the intention with which it was published.

I have hitherto considered those things only as being matters of fact, or objects of a jury's consideration, which are capable of being proved or disproved by witnesses; because this is the plainest and clearest mark of distinction between them and matters of law that can, as I apprehend, be given. But I conceive that the province of the jury extends a degree further than this, and that they have a right to make all such inferences from facts as may be made without any skill or knowledge of the law, even if no new evidence could be given by witnesses in support of such inferences. For such inferences from facts are merely operations of reason, which is a talent common to all men, to jurymen as well as to judges: and, with respect to the meaning of seditious papers, and the intentions of the publishers

publishers of them, and their tendency to produce certain bad effects stated in an information, it often happens that jurymen are better able to make these inferences than judges, even where no evidence should be given by witnesses concerning them; because they have often a more extensive intercourse with the rest of mankind, and a greater knowledge of the business and conversation of the world, than judges (who are men of retired lives, given up to the study of the law, and the discharge of the duties of their respectable offices) can be supposed to have. Those inferences, therefore, ought not to be called inferences of law, but inferences of fact, being a secondary or subordinate species of facts derived from the more simple and direct facts, of which they are the circumstances or properties. For facts may be divided into two classes, which it may perhaps be of some use, in considering this subject, to distinguish by the names of *primary* and *secondary facts*. The former, or *primary* facts, are those plain and simple facts which are the objects of the senses, and are generally proved by the positive testimony of witnesses; such as, whether such a man gave such another a blow, or a wound with a sword, or fired a pistol at him,

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or whether such an one delivered a particular paper to such another; though even these may sometimes be collected by inference from circumstances. These things are so plainly matters of fact, that no sophistry in the world can make them appear to any body to be matters of law. But the latter, or *secondary* facts, are facts of a more abstract or remote kind, and may often be collected from the former by mere reasoning, without the help of external testimony. Such is the intention of a man in breaking open and entering a house by night; which, if it be to commit a felony, makes the breaking and entering the house amount to the crime of burglary, which is punished with death; but if it be to commit a trespass only (as, for instance, to beat or frighten somebody in the house), makes it only a misdemeanour, which is punishable by fine and imprisonment. And such is the intention of a writer, in writing and publishing a paper against the measures of government; which, if it be to raise a spirit of discontent in the people against their governors, is criminal, and makes the writer and publisher liable to punishment; but, if the paper is intended only as a petition to the king, or any inferior magistrate,

praying him to desist from a measure by which the petitioner thinks himself aggrieved, and it is delivered only to the person from whom the redress is prayed, it is an innocent intention, and cannot make the act of publishing the paper the object of punishment. In all these cases, the intention of the party accused is a matter of fact, as well as the giving a blow, or a wound with a sword, or firing the pistol, or breaking and entering the house; and the writing and publishing the paper, though it is of a less gross and obvious nature than those other facts, and less capable of being proved by the positive testimony of witnesses, and sometimes can only be collected from those other facts, by reasoning upon them; I say *sometimes*, because, for the most part (as we have seen above), it will also admit of confirmation and explanation by the testimony of witnesses. These facts, therefore, from their being concomitant circumstances of the former, or more simple facts, may, with some propriety, be called *secondary* facts, if the former be called *primary* ones. And this distinction may, perhaps, be useful to prevent these secondary facts from being confounded with matters of law, with which they agree
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only in this point, to wit, that some degree of reasoning is to be used in discussing and investigating them both. But the difference between the cases is this. The reasoning to be used in the investigation of matters of law, is grounded on the knowledge of the law, and can only be used by persons who are possessed of that knowledge; whereas, in the case of these secondary facts, the reasoning to be used is grounded on common sense, and a knowledge of the world, and the present transactions of it, and the stories that are told of persons in active life, and in offices of great rank and power; all which (as we before observed) are things that are often better known to jurymen than to judges. And therefore we may conclude, that if no evidence could be produced by witnesses, to confirm or disprove these secondary facts, yet the jury would still have a right to judge of them, and to infer them from the primary facts, by the exercise of their own reason. But it almost always (or, perhaps, absolutely always) happens, that these secondary facts, though they may in some degree be inferred from the primary facts by mere reasoning, yet may be also confirmed, or controuled and disproved, by the positive testimony of witnesses; which distinguishes them still more clearly from matters

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ters of law (in determining which the testimony of witnesses is wholly inadmissible), and proves them beyond a doubt, to be matters of fact, in the law-sense of the phrase, or objects of the consideration and determination of a jury, according to the fundamental position above laid down, to wit, that such matters are proper objects of the consideration and determination of a jury, as are capable of being proved or disproved by the evidence of witnesses. I conclude, therefore, that both *the intention* of the writer and publisher of a paper charged to be a seditious libel, and *the tendency* of the paper to disturb the public peace, or produce the other mischievous effects set forth in the information (which are secondary facts in the sense herein before defined), are proper objects for the consideration and determination of a jury, or, in the usual law-phrase, matters of fact, as well as the actual writing and publication of it.

If this conclusion is just, the whole business of a jury, upon the trial of an information for writing and publishing a seditious libel, may be said, in few words, to be this: "To

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inquire into the conduct of the person charged with having written and published the paper in question, by the means of the evidence of witnesses, and of such fair inferences as they, the jury, by their natural reason and good sense, are able to derive from the said evidence; and, having thus discovered what the conduct of the said defendant, with respect to the said charge, has been, to compare it with the conduct imputed to him in the information; and, if they find it to be the same with the conduct imputed to him in the information in all points, to affirm the information, by finding the defendant *guilty* of the charge in the manner and form set forth in the information (for those are the words used in a verdict of conviction); and, if they find his conduct, as proved by the evidence, to fall short of the conduct imputed to him in the information, in any of the four points above-mentioned, to deny the information, by finding the defendant *Not guilty* of the charge in the manner and form set forth in the information, which are the words used in a verdict of acquittal." This seems to me to be an accurate and plain description of the
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duty of a jury on the trial of one of these informations.

When the jury have thus exercised their office of inquiring whether the defendant's real conduct has been commensurate with the conduct imputed to him in the information, and have determined that it has been so, by finding him guilty of the charge in the manner and form set forth in the information, there still remains another point to be considered before judgment can be given against the defendant, which is, whether the offence so charged and found by the jury is a public offence, or an object of legal punishment. For, if it shall be made appear by just and legal reasonings at the bar, that the writing and publishing the paper in question, though it was done deliberately, and has the tendency ascribed to it in the information, yet is not an offence of such great and public consequence as to be an object of legal punishment, it will be the duty of the court to forbear giving judgment against the defendant, and to dismiss him with impunity, notwithstanding the verdict of conviction found against him by the jury. But this I apprehend,

hend, is a matter which the judges only have a right to determine, either upon a motion made before them on the behalf of the defendant in arrest of judgment, or of their own accord, without such a motion, if they of their own accord come to be of opinion that the facts charged in the information do not constitute a legal offence. For this is really and truly a matter of law, and not a secondary fact, or inference from other facts, nor a matter to which the testimony of witnesses is in any degree applicable (like the intention of the writer, and the tendency of the paper, and other such secondary facts as have been above mentioned), and therefore is not a fit object of the consideration and determination of a jury. An instance or two will make this matter very plain. It is certainly a public and punishable offence to publish a paper tending to disgrace and vilify the King upon the throne, and alienate the affections of his subjects from his person and government, more especially if the imputations thrown out against him are false. This was the offence committed by Doctor Shebbeare in the reign of our late gracious Sovereign, George II. for which, in the opinion of most people, he was deservedly punished. But,
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if the same abuse were now to be republished against the same good monarch, it may be doubted whether the publisher of it would be an object of legal punishment, though he would justly incur the censure, and excite the indignation of all good men, that remembered the just and prudent government, and respected the memory of our late Sovereign. For, as it can no longer tend to produce the same bad effects as formerly, the monarch, who was the object of it, being no longer among the living, it seems unreasonable to suppose that it could be the object of that legal censure which was grounded on its tendency to produce those bad effects. Yet it might be said, on the other hand, that it still had a tendency to produce *some* bad effects, though not the same as before, nor of so great importance; and that, on account of its said tendency to produce these lesser bad effects, it ought still to be the object of some, though a lesser legal punishment. And to this it might be replied, on the behalf of the re-publisher, that every act that *in a small degree* has a tendency to produce some ill effect, ought not to be the object of a legal punishment, and is not so by the law of England;—that, for example,

ample, the most scurrilous words spoken (but not written), even of a person now alive, are not the object of such punishment. but only of a civil action; and many scurrilous words are not even the object of a civil action, but only of a proceeding in the ecclesiastical court of the bishop of the diocese, carried on *pro salute anime, et correctione morum*;—that only those actions are the objects of legal punishment in the temporal courts, which have a tendency to produce some very pernicious public consequences, and disturb the administration of the government; and that this was not likely to be the effect of a re-publication of the abuse upon our deceased sovereign; and consequently that such a re-publication was not the object of legal punishment. Now in all this argument the testimony of witnesses is evidently quite inadmissible; nor can mere reason, or common sense determine on which side the truth lies; but it is plain, that this can only be determined by the principles of the criminal law of England, and the decisions of former judges, upon solemn arguments, in cases of the same kind, or that are nearly similar to it, if such are to be found; and therefore, it is truly a matter of law, and must be determined by the judges only. But
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this does not at all interfere with the right that has been above ascribed to the jury, of determining the truth of all the charges contained in the information, or declaring whether, or no, the conduct of the defendant, as proved by the witnesses, agrees, or is commensurate with the conduct imputed to him in the information, with respect to all the allegations of which the information is composed.

I have now gone through all I had to offer in the way of reason and argument, concerning the extent of the province of the jury, in the trial of an information for publishing a seditious libel. I am sensible I have used a great number of words on this occasion, and even some repetitions, which I knew not well how to avoid, and which, I therefore hope, the reader will excuse; more especially as the reason of my treating this matter so fully was, that he might clearly see the grounds upon which I have presumed to differ in opinion from those learned and respectable persons who have declared, that the intention of the publisher of a seditious paper is a matter of law, which the jury have no right to consider. The great respect due to those eminent persons, made me at first almost afraid to
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differ from them, and excited me to examine the subject with as much care and attention as I was capable of bestowing on it ; in consequence of which, I became perfectly convinced that their opinion was not well grounded. And the same respect to their authority made me afterwards cautious of expressing the opinion I had formed in opposition to that which they had declared, without, at the same time, setting forth, in the fullest manner I could, the reasons upon which I had presumed to differ from them, and adopt the other opinion. And now, that I have ventured to state and maintain that other opinion, I shall (from the same motive of respect to those great persons) endeavour to confirm and support it by the authority of other great persons who formerly held the same high offices of judicature with themselves, opposing judge to judge, and chief justice to chief justice, in at least equal numbers, and marshalling on my side of the argument,

Pares aquilas, et pila minantia pilis ;

lest the weight of these great modern authorities should be thought to overbear the arguments, which, in the course of this enquiry,
have

have been deduced from reason only, in favour of what I take to be the true opinion upon the subject.

In the famous trial of the seven Bishops, who were prosecuted in the last year of the reign of King James II. by an information in the Court of King's Bench, for publishing a seditious libel, Sir Robert Sawyer (who had been Attorney General), Mr. Finch, and Mr. Somers (who was afterwards Lord Chancellor), were of counsel for the Bishops, and Sir Thomas Powys (the then Attorney General), and Sir William Williams (the then Solicitor General), were of counsel for the Crown: Sir Robert Sawyer contended, " That both the falsity of the paper, and " that it was malicious and seditious, were all " matters of fact to be proved;" and made this the first head of his speech to the jury; so that here we see, that the falsehood of the paper, the malicious intention of the writer, and the seditious tendency of the paper, are all asserted by this learned lawyer to be matters of fact, and objects of the consideration of the jury. His brother counsel held the same language. Mr. Finch expressed him-

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self thus : " If you, gentlemen, should think
 " that there is evidence to prove the delivery,
 " by the Bishops, of the paper set forth in
 " the information, yet, unless their present-
 " ing it to the King in private may be said to
 " be a malicious and seditious libel, with an
 " intent to stir up the people to sedition, and
 " to diminish the King's prerogative and au-
 " thority ; unless all this can be found, there
 " is no man living can find the Bishops guilty
 " upon this information." This was asserting,
 that the *ill intention* of stirring up discontents
 in the minds of the people against the King,
 was an essential part of the charge, and one
 that the jury ought to take into their conside-
 ration, and not leave to the judges as a mere
 inference of law. Mr. Somers spoke next,
 and said, That " the paper could not possibly
 " stir up sedition in the minds of the people,
 " because it was presented to the King alone.
 " False it could not be, because the matter of
 " it was true. There could be nothing of
 " malice : for the occasion was not sought ; the
 " thing was pressed upon them. And a libel
 " it could not be, because the intent was inno-
 " cent." The Attorney General, Powys, there-
 on said, " That he should not *now* meddle
 " with..

“ with what the defendants’ counsel had offered, because it was not pertinent.” And then Sir Robert Wright, the Chief Justice, interposed with these remarkable words: “ Yes, Mr. Attorney, I’ll tell you what they offer, which it will lie upon you to give an answer to; they would have you shew how this has disturbed the government, or diminished the King’s authority.” Here then we have King James II’s Chief Justice of the King’s Bench expressly declaring in this celebrated trial at bar, that the tendency of the paper in question, to disturb the government, ought to be made out to the satisfaction of the jury. Mr. Justice Powell said, “ The contrivance and publication are both matters of fact, and, upon issue joined, the jurors are judges of the fact, *as it is laid* in the information.” Mr. Justice Holloway, after the evidence had been summed up to the jury, spoke these words: “ The question is, whether this petition be a libel or no. Gentlemen, *the end and intent* of every action *is to be considered*; and likewise in this case we are to consider the nature of the offence that these noble persons are charged with. It was for delivering a petition

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“ tion, which, according as they have made
 “ their defence, was with all humility and
 “ decency that could be; so that, if there was
 “ no *ill intent*, and they were not men of evil
 “ lives, or the like, to deliver a petition can-
 “ not be a fault, it being the right of the sub-
 “ ject to petition. *If you are satisfied there*
 “ *was an ill intention of sedition, or the like,*
 “ *you ought to find them guilty:* but, if there
 “ be nothing in the case of that kind, I think
 “ it is no libel. *It is left to you, gentlemen;*
 “ but that is my opinion.” The jury are
 here expressly directed to consider, whether
 the Bishops had any intention of sedition or
 not, in presenting their petition to the King,
 and to find them guilty or not guilty accord-
 ingly. So far was this judge from thinking,
 that the intention of the defendants was a
 mere inference of law, which the jury had
 no authority to make. Mr. Justice Powell
 went further still, and said, that the falsehood
 of the paper, as well as the malicious inten-
 tion of the publisher of it, and its tendency
 to disturb the government, ought to be prov-
 ed: by which we may observe, by the bye,
 that the modern opinion, “ That the false-
 “ hood charged upon a libel in an informa-
 “ tion,

“ tion, is not a material part of the charge,
 “ and needs not be proved,” was not at that
 time universally adopted by the judges. His
 words are as follow: “ Truly, I cannot see,
 “ for my part, any thing of sedition, or any
 “ other crime, fixed upon these reverend
 “ Fathers. For, gentlemen, to make it a li-
 “ bel, it must be false, it must be malicious,
 “ and it must tend to sedition. As to the
 “ falsehood, I see nothing that is offered by
 “ the King’s counsel, nor any thing as to the
 “ malice. Now, gentlemen, the matter of
 “ it is before you ; you are to consider of it,
 “ and it is worth your consideration, &c.”

Such were the directions of Chief Justice Wright, and Justice Holloway, and Justice Powell, at this famous trial ; by which we see, that the intention of the defendants in publishing the petition or paper, and the tendency of the paper to raise discontents in the minds of the King’s subjects against his government, were so far from being considered by them as mere inferences of law, which they, the judges, only had a right to make, that they were recommended to the consideration of the jury, as the principal objects to which it was necessary for them to attend.

And

And Chief Justice Holt appears to have been of the same opinion, when he summed up the evidence to the jury upon the trial of the information against Tutchin, the writer and publisher of certain papers, called *The Observators*, in the year 1704. His words, on that occasion, were as follows: "Gentlemen
 " of the jury, this is an information for publishing libels against the Queen and her government." And then, after stating the proof of the publication, and reading some passages from *The Observators*, he goes on in this manner: "So that, now you have heard
 " this evidence, you are to consider whether
 " you are satisfied that Mr. Tutchin is guilty
 " of writing, composing, and publishing these
 " libels. They say they are innocent papers,
 " and that nothing is a libel but what reflects
 " upon some particular person. But this is
 " a very strange doctrine, to say it is not a
 " libel reflecting on government to endeavour to possess the people, that the government is mis-administered by corrupt persons, that are employed in such and such
 " stations, either in the navy or army. For
 " it is very necessary for all governments,
 " that the people should have a good opinion
 of

“ it: and nothing can be worse than to en-
 “ deavour to procure any animosities as to
 “ the management of it. This has been al-
 “ ways looked upon as a crime; and no go-
 “ vernment can be safe, without it be punish-
 “ ed. Now, *you are to consider*, whether those
 “ words, I have read to you, do not tend to
 “ beget an ill opinion of the administration
 “ of the government.” Here we find this
 able Chief Justice expressly directing the
 jury to consider *the tendency* of the papers in
 question, to wit, Whether they do not
 tend to beget an ill opinion of the admini-
 stration of the government? How dif-
 ferent is this conduct from asserting that this
 tendency is a mere inference of law, which
 the judges only have a right to make, with-
 out any concurrence of the jury? From these
 authorities, together with the reason above
 set forth, I flatter myself that the reader will
 join with me in concluding, that, upon the
 trial of an information for writing and pub-
 lishing a seditious paper, the jury have a right
 to determine all the particulars of the charge,
 the malicious intention of the writer, and the
 mischievous tendency of the paper, as well as
 the more simple facts of the writing and pub-
 lication of it, and the meaning of the blanks
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and feigned names in it ; and that the only question which the judges are to determine is, whether, if the whole information, with all the allegations contained in it, the malicious intention of the writer, and the mischievous tendency of the paper, be admitted by the defendant, or found by the jury to be true, the conduct so described and found is an object of legal censure. I could wish, that even this last particular were also to be determined by the jury : but it rather, I must confess, appears to me to belong to the province of the judges.

F I N I S.